Supreme Court, U.S.
FILED

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NO._____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1995

MOHAMMAD AHMAD HAMMAD

Petitioner,

versus

UNITED STATES OF AMERICA

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether trial counsel rendered ineffective assistance accompanied by prejudice when he failed to proffer substantial mitigating evidence that would have caused the district court to sentence petitioner at the base of the offense level, viz, 57 months. Amendment VI.

2. Whether trial counsel rendered ineffective assistance accompanied by prejudice when he failed to proffer substantial mitigating evidence under §5k2.0 and 18 u.s.c. §3553 not taken into consideration by the sentencing commission that would have caused the district court to depart downward. Amendment VI.

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OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit, affirming denial of the writ was not published. A copy of the unpublished opinion of April 11, 1995, is attached as Exhibit A.

STATEMENT OF JURISDICTION

Because Petitioner did not file a motion for rehearing in the Fifth Circuit, this petition is due on or before July 10, 1995. This Court has jurisdiction of the petition under 28 U.S.C. §1257.

CONSTITUTIONAL PROVISION INVOLVED

The controversy here involves the Sixth Amendment to the United States Constitution.

STATEMENT OF THE CASE

Petitioner Hammad was indicted with others on one count of conspiracy to use unauthorized access devices with intent to defraud (count 1) in violation of 18 U.S.C. § 1029(b)(2), and on nineteen counts of aiding and abetting the unauthorized use of access devices to obtain long distance telephone services worth more than $1,000 (counts 2-20) in violation of 18 U.S.C. §§ 2 & 1029(a)(2). (R. I: 81). He rested without putting on evidence and moved for an acquittal. The District Court acquitted him on counts 9-20.

Trial began on March 19, 1991. Verdict was rendered on March 25, 1991, and Petitioner complied with his bond amendment and was released on March 27, 1991. He was arrested in Chambers County, Texas, on two counts of failing to pay state fuel tax. The District Judge issued a bench warrant. Petitioner appeared before a magistrate in the Eastern District and bond was set at $50,000 surety. He failed to appear for a scheduled bond hearing on May 6, 1991, and a bench warrant was issued May 8, 1991. He remained a fugitive until March 19, 1992, when he was arrested at Houston International Airport after voluntarily returning to the United States.

Petitioner's sentence was imposed pursuant to the sentencing guidelines (SG § ____) promulgated by the United States Sentencing Commission. The sentencing guidelines create a base offense level of six (6) for individuals convicted of fraud offenses. SG § 2F1.1(a). The base offense level is subjected to incremental increases if the loss exceeds $2,000.00. SG § 2F1.1(b)(1). In the presentence report (PSR § ____) the probation department calculated Petitioner's offense level on the basis of its determination that the losses were approximately 2.2 million dollars. PSR § 32. (The presentence report is noted at R. 1: 211 as a sealed document.) The probation department therefore recommended an upward adjustment of ten (10) levels pursuant to SG § 2F1.1(b)(1)(K). The probation department also recommended the following additional upward adjustments: a two (2) level increase pursuant to SG § 2F1.1(b)(2) because the offense involved more

than minimal planning; a three (3) level increase pursuant to SG § 3B1.1(b) for Petitioner's role in the offense; and, because Petitioner obstructed justice by failing to appear at the originally scheduled sentencing hearing, a two (2) level increase pursuant to SG § 3C1.1. PSR §§ 27, 33, 35, 36. Consequently, the probation department calculated Petitioner's total offense level at twenty-three (23) which, when coupled with the determination that Petitioner had a category III criminal history, resulted in a sentencing guideline range of 57 to 71 months. PSR §§ 39, 43, 46.

Petitioner made objections to the presentence report, but the District Court overruled them and sentenced him on April 6, 1992, to sixty (60) months on count 1 and a concurrent seventy-one (71) months on counts 2 through 8.

On appeal Petitioner claimed (1) the evidence was insufficient to prove beyond a reasonable doubt that he aided and abetted the use of unauthorized access devices as alleged in counts 2 through 6 of the indictment, (2) his offense level was improperly calculated based on an amount of loss not supported by any credible evidence, and (3) the District Court erred in allowing an upward adjustment for his role in the offense.

The Fifth Circuit affirmed on May 1, 1993, in an unpublished opinion, No. 92-2326.

Petitioner filed his §2255 petition to vacate sentence on July 6, 1994, (R.I. 254). The District Court entered summary dismissal on July 14, 1994,

and petitioner gave notice of appeal on July 19, 1994. (R.I. 232, 234). The Fifth Circuit disposed of the appeal by summary calendar on April 11, 1995. See Exhibit A.

REASONS FOR GRANTING THE WRIT

A. Standard of review on ineffective assistance.

A claim that counsel's performance fell below the threshold for effective assistance is analyzed under the framework that this Court established in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). To carry his burden, Petitioner must show that (1) his attorney's performance was deficient and (2) this inadequate exhibition prejudiced his defense. *United States v. Smith*, 915 F.2d 959, 963 (5th Cir. 1990).

To satisfy the first prong, Petitioner must show that the alleged errors of his counsel were so serious as to render the assistance received below the constitutional minimum guaranteed by the Sixth Amendment. *Strickland*, 466 U.S. at 686. That constitutional minimum is measured against an objective standard of reasonableness. Id. at 688.

As to the second prong, the Petitioner must demonstrate that his counsel's inferior performance so prejudiced his defense that the proceeding was fundamentally unfair. Id. This test is the linchpin and requires a showing that, but for counsel's unprofessional errors, there was a reasonable

probability that the District Court would have portioned out a sentence at base level or departed downward.

B. Trial counsel's performance.

Mr. Saranello knew at the time of trial and sentencing the following information but did not cause it to be incorporated in the presentence report or otherwise advise the District Court of its existence.

1. Petitioner had been working with the FBI since 1985 and received approximately $5,000 a year for his services;

2. Petitioner's control agent was Dale Rivett, FBI, from 1985 through October 1989, and Ruben Lopez from November 1989 through October 1990;

3. Petitioner also dealt with a Mr. Salinski, FBI, who was purportedly in charge of the terrorist division;

4. Petitioner, at the behest of the FBI, kept the financial books of Frank Amigo, a co-defendant, who supported the PLO;

5. Petitioner, at the request of the FBI, infiltrated the Palestine Liberation Front (PLF), and worked himself up into the hierarchy of that organization;

6. Petitioner, at the request of the FBI, copied phone bills of Frank Amigo, a co-defendant;

7. Petitioner, at the insistence of the FBI, developed a relationship with Mohammad Zaydoun (sic), the head of the PLF in Houston, and a cousin of Mohammad Alabass (sic), the leader of the PLF abroad;

8. Petitioner was responsible for obtaining explosives for Mohammad Zaydoun, Mahmoud Abu Arra, Ahmad Khaled and Tariq Sanjak, who were conspiring to bomb the federal building in Houston in 1986 or 1987. That this information was communicated to Mr. Rivett, who, in turn, told Petitioner to advise the conspirators he could not acquire the explosives;

9. That in 1987 or 1988 the PLF intended to assassinate Israel's Prime Minister when he came to Houston. Two individuals were dispatched from Lebanon to accomplish that feat. Because weapons were needed, Rivett told Petitioner to set up the exchange. A Black agent, name unknown, acted as the gun dealer. According to Petitioner, Rivett thought this was a hoax; consequently, Petitioner took a polygraph and passed it. Finally, Zaydoun aborted the mission;

10. In 1987 or 1988 Zaydoun wanted to bomb the El Al terminal in New York and shoot everyone in it. Mr. Rivett and Petitioner "bugged" the rental car being used by Petitioner. Numerous conversations between Petitioner, Zaydoun and

Sanjak were taped. Petitioner, at Rivett's request, got Zaydoun to terminate the mission;

11. The FBI stopped Sanjak in 1991 regarding the conspiracy to assassinate Israel's Prime Minister. Petitioner was then a fugitive and living in Jordan. Sanjak came to Jordan looking for him;

12. Petitioner, in 1990, turned over to Bob Rosebush, Secret Service, all Frank Amigo related documents;

13. Bob Rosebush wanted Petitioner to testify against Amigo;

14. In February or March of 1989, when the U.S. Secret Service arrested Frank Amigo, Petitioner met with Dale Rivett and offered to help the Secret Service build a strong case against Amigo. Rivett informed Petitioner that the FBI could not afford to blow Petitioner's cover and expose him; that he was to valuable to the government. Rivett told Petitioner that the government would handle Amigo.

15. In 1987, Zaydown, Khaled and Sanjak plotted to kidnap Sanjak's cousin for a $4,000,000 ransom with the help and approval of the PLF in Iraq. Petitioner helped arrange everything between them and the FBI; however, right before it happened, the command in the PLF in Iraq ordered Sanjak to abort the mission.

Petitioner swore in his writ that assertions 1 through 15 were true. (R.I. 245). The United States Attorney's Office, Southern District of Texas, Houston, has yet to claim falsity; moreover, Petitioner has been stonewalled on his separate request regarding Freedom of Information-Privacy Acts, 5 USCS §552(a)(4)(B).

The proper measure of attorney performance remains simply reasonableness under prevailing professional norms. Strickland, 466 U.S. at 688. All of the circumstances must be considered while guarding against hindsight and second-guessing. *Loyd v. Whitley*, 977 F.2d 149 (5th Cir. 1992).

Trial counsel's omission herein presented "no advantage," nor can the failure to proffer be characterized as a strategic choice. *Profitt v. Waldron*, 831 F.2d 1245, 1249 (5th Cir. 1987); *Martin v. McCotter*, 796 F.2d 813, 819 (5th Cir. 1986), *cert denied*, 479 U.S. 1057 (1987).

Accordingly, trial counsel's performance was deficient.

C. Was Petitioner prejudiced by the omission?

A district court may depart downwards from the guidelines if it finds "`there exists [a] . . . mitigating circumstances of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different

from that described.'" U.S.S.G. § 5k2.0, p.s.; 18 U.S.C.A. § 3553(b)

But for trial counsel's error of omission, a reasonable probability existed that Petitioner would have been sentenced near or at the base offense level or afforded a departure downward. A reasonable probability is one sufficient to undermine confidence in the outcome.

The Commission says, in its formal treatment of departures, that the departure is to occur when "a court finds an atypical case," one "where conduct significantly differs from the norm." U.S.S.G., Ch. 1, Pt.A, §4(b). What the Commission has focused on is "the case" conduct. Neither case nor conduct can be reduced to a single factor. Case and conduct are a total pattern of behavior. *United States v. Cook*, 938 F.2d 149, 153 (9th Cir. 1991). Additionally, in determining the sentence to impose within the Guideline range, or whether a departure is warranted, a sentencing court may consider, without limitation, any information concerning the background, character and conduct of the defendant, unless prohibited by law. *United States v. Roberson*, 872 F.2d 597 (5th Cir. 1989); Guidelines § 1B1.4. Petitioner's background, employment and aid to the U.S. government is no less meaningful or beneficial to his claim than one awaiting sentence who had shot down 18 MIG 25s in Vietnam, received the Congressional Medal of Honor, or instigated a coup in South America that overthrew a Communist dictator.

With Petitioner's total pattern of behavior and conduct in mind, the information listed in items 1 through 15 amounts to positively impacting the national security of the United States of America and soothing a possible Middle East confrontation; consequently, the conclusion cannot be avoided that it is at least "reasonably probable" that the District Court would have sentenced Petitioner at or near the base offense level or departed downward. See *United States v. Kikumura*, 918 F.2d 1984 (3rd Cir. 1990) (upward departure appropriate when defendant significantly endangers national security, §5K2.14). Additionally, the holding in *United States v. Headley*, 923 F.2d 1079 (3CA 1991), appears to be in direct conflict with *United States v. Miro*, 29 F.3d 194, 198-99 (5CA 1994), and *United States v. Rojas*, 868 F.2d 1409, 1410 (5CA 1989), cases cited by the Court below to dispose of Petitioners claim.

The Fifth Circuit believes a district court that was deprived of information that might warrant a downward departure is in the same posture as one that refuses to depart possessing information that might justify it. There is a distinction and it is not obscure. *United States v. Headley*, 923 F.2d at 1084.

Accordingly, Petitioner was prejudiced by his counsel's failure to bring this to the attention of the District Court.

CONCLUSION

For the foregoing reasons, it is requested that the Court grant this petition for certiorari.

Respectfully submitted,

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APPENDIX

(Opinion Filed April 11, 1995)

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-20539
Summary Calendar

UNITED STATES OF AMERICA
Plaintiff/Appellee

vs

MOHAMMAD AHMAD HAMMAD
Defendant/Appellant

Appeal from the United States District Court for
the Southern District of Texas
(CA-H-94-2326; CR-H-90-305-2)

Before JONES, BARKSDALE, and BENAVIDES, Circuit Judges.

PER CURIAM:[1]

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[1] Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

Mohammad Ahmad Hammad appeals the district court's summary dismissal of his motion to vacate, set aside, or correct his sentence. We AFFIRM.

I.

Hammad and others were charged in a 20-count indictment with conspiracy (count 1), and aiding and abetting in connection with the unauthorized use of access devices (counts 2-20). After the presentation of evidence, Hammad moved for a judgment of acquittal on all counts, which was granted in part. He was convicted and sentenced on the remaining eight counts. Hammad's conviction and sentence were affirmed. United States v. Hammad, No. 92-2326 (5th Cir. May 11, 1993).

Hammad sought to have his sentence vacated, set aside, or corrected pursuant to 28 U.S.C. § 2255. After considering the motion along with the record of the criminal proceeding, the district court concluded that Hammad was not entitled to relief. Accordingly, and pursuant to Rule 4(b) of the Rules governing Section 2255 Proceedings, the court dismissed summarily Hammad's motion.

II.

"This Court consistently requires district courts to state findings and conclusions for their rulings on motions to vacate sentence filed under 28 U.S.C. § 2255." *United States v. Daly*, 823 F.2d

871, 872 (5th Cir. 1987). Such findings are normally "`indispensable to appellate review.'" Id. (quoting *Hart v. United States*, 565 F.2d 360, 362 (5th Cir. 1978)). "[U]nless the record conclusively shows that the petitioner is entitled to no relief, the district court must set out his findings of fact and conclusions of law when ruling on a § 2255 motion." *United States v. Edwards*, 711 F.2d 633, 633 (5th Cir. 1983). As hereinafter discussed, our review of the record reflects that Hammad is entitled to no relief; and, thus, the district court properly dismissed his motion.

Hammad received a sentence of 60 months for the conspiracy count and a concurrent sentence of 71 months for the seven aiding and abetting counts.[2] Hammad contends that his trial counsel rendered ineffective assistance by failing to proffer mitigating evidence that would have caused the district court either to sentence him at the lower end of the applicable sentencing range, or to depart downward outside that range. Specifically, he claims his trial counsel knew that he was a paid informant for ht FBI, that he was a "mole" in a Palestinian terrorist organization operating in the United States, and that he helped to thwart several terrorists plots, including the bombing of the federal building in Houston, Texas, the assassination of an Israeli prime minister, and the bombing of the El Al Airline terminal in New York.

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[2] Based on the Sentencing Guidelines, Hammad received an offense level of 23 and a criminal history category of III; the applicable guideline range was 57 to 71 months.

The two well known components for an ineffective assistance of counsel claim are deficient performance, and prejudice. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). The prejudice prong focuses on whether the allegedly deficient performance renders the results unreliable or the proceedings fundamentally unfair. As the Supreme Court noted recently,

> an analysis focussing soley on mere outcome determination, without attention to whether the result of the proceeding was fundamentally unfair or unreliable, is defective. To set aside a conviction or sentence soley because the outcome would have been different but for counsel's error may grant the defendant a windfall to which the law does not entitle him.

Lockhart v. Fretwell, ___ U.S. ___, ___, 113 S.Ct. 838, 842-43 (1993). Moreover, for prejudice in the sentencing context, a petitioner must show "a reasonably probability that but for trial counsel's [alleged] errors the defendant's non-capital sentence would have been *significantly less harsh*." *United States v. Segler*, 37 F.3d 1131, 1136 (5th Cir. 1994) (quoting *Spriggs v. Collins*, 993 F.2d 85, 88 (5th Cir. 1993).

The constitutional right to effective assistance of counsel "is recognized not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial. Absent some effect of challenged conduct on the reliability of the trial

process, the Sixth Amendment guarantee is generally not implicated." *Fretwell*, ___ U.S. at ___, 113 S.Ct. at 842. "Unreliability or unfairness does not result if the ineffectiveness of counsel does not deprive the defendant of any substantive or procedural right to which the law entitles him." Id. at ___, 113 S.Ct. at 844.

Hammad does not claim a deprivation or a substantive or procedural right to which the law entitles him. The sentence that the district court imposed was within the guideline range; it was legal. United States v. Miro, 29 F.3d 194, 198099 (5th Cir. 1994)("a claim on appeal that a sentencing judge refused to depart from the Guidelines and imposed a lawful sentence provides no ground for relief"); United States v. Rojas, 868 F.2d 1409, 1410 (5th Cir. 1989)(same). Accordingly, Hammad has failed to claim any prejudice resulting from the alleged ineffective assistance of counsel.

III.

For the foregoing reasons, we

AFFIRM.